



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

October 14, 1994

Mr. George M. Kirk  
Gottesman, McAllister & Kirk, P.C.  
8 Greenway Plaza, Suite 802  
Houston, Texas 77046

OR94-651

Dear Mr. Kirk:

You ask for reconsideration of Open Records Letter No. 94-583 (1994), which concerned a request for information relating to a certain complaint lodged against Smithville Independent School District, which you represent. We assigned your request for reconsideration ID# 29527.

The Smithville Independent School District (the "school district") received a request for "all information regarding your response to Julius Gordon" by letter dated March 1, 1994, "including 'falsified government records', and cost for added 'implementation of short term police security.'" In addition, the requestor sought "your response to TWRCC, State Health [Department], EPA, CPS, and Smithville police regarding all issues outlined in the above mentioned letter." You advised us that the school district objected to the release of some of the requested information, which you submitted to us for review, and claimed that sections 552.103 and 552.111 of the Government Code excepted it from required public disclosure. We subsequently ruled that neither exception applied to the requested information. You now contend that we erred in our application of section 552.103 to the requested information.

You assert that the requested information is excepted from required public disclosure under section 552.103 of the Government Code, claiming the "investigative privilege" and citing two Supreme Court cases as authority. You contend that we must apply the two-pronged test that the Texas Supreme Court articulated in *National Tank Co. v. Brotherton*, 851 S.W.2d 193, 203 (Tex. 1993), to determine whether the requested information was made in reasonable anticipation of litigation.

The two-pronged test articulated in *National Tank Co.*, as well as the two-pronged test articulated in *Flores v. Fourth Court of Appeals*, 777 S.W.2d 38 (Tex. 1989), that *National Tank Co.* modified, applies only when a person is determining whether certain information is subject to discovery under the Texas Rules of Civil Procedure. See

*National Tank Co.*, 851 S.W.2d at 203-07 (construing two-pronged test developed in *Flores* case for purposes of TEX. R. CIV. P. 166b(3)(d)); *Flores*, 777 S.W.2d at 39 (stating that crux of case is whether communication is prepared in anticipation of litigation and therefore privileged under TEX. R. CIV. P. 166b(3)(d)). For discovery privileges to exempt information under section 552.103, the requested information first must meet the section 552.103 requirements. Open Records Decision No. 575 (1990) at 2 (construing former section 3(a)(3), V.T.C.S. article 6252-17a). As we stated in Open Records Letter No. 94-583, the mere fact that the school district might in the future bring civil or criminal actions against the requestor does not establish that litigation is pending or reasonably anticipated. Open Records Decision No. 557 (1990) at 6. Nor does the mere fact that a requestor, on more than one occasion, publicly states an intent to sue. Open Records Decision No. 452 (1986).

The Open Records Act places on a governmental body the burden of establishing why and how an exception applies to requested information. Open Records Decision Nos. 542 (1990); 532 (1989); 515 (1988). The school district did not meet its burden of establishing why and how section 552.103 applied to the requested information. Accordingly, the information was presumed to be public. As you have not submitted compelling reasons to overcome this presumption, such as confidentiality under another source of law or third party privacy interests, we uphold our ruling in Open Records Letter No. 94-583: the school district must release the requested information in its entirety.

Yours very truly,

A handwritten signature in cursive script, reading "Loretta DeHay".

Loretta R. DeHay  
Assistant Attorney General  
Open Government Section

LRD/LBC/rho

Ref.: ID# 29527  
Open Records Letter No. 94-583

Enclosures: Submitted documents